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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON, PETITIONER,

vs.

JAMES CONDON AND C. H. KOLLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,079)

(36,079)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1931

[fols. a-c] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS, EL PASO DIVISION

No. 1379. Law

L. A. NIXON, Plaintiff,

vs.

JAMES CONDON and C. H. KOYLE, Defendants

PLAINTIFF'S PETITION—Filed Mar. 15, 1929

To the Honorable Charles N. Boynton, Judge of said Court:

Comes now the plaintiff, L. A. Nixon, and for cause of action against the defendants, alleges:

[fol. 2] 1. That plaintiff is, and at all times mentioned in this complaint was, a citizen of the United States and of the State of Texas and a resident of the City and County of El Paso, in the State of Texas; and sues herein on an action which arises under the Constitution and laws of the United States, and is brought to redress and enforce his right as a citizen of the United States to vote in the State of Texas, and to redress the deprivation under the color of a law or statute of the State of Texas of rights and privileges secured to him by the Constitution, statutes and laws of the United States; to redress an injury which he sustained by reason of the acts of defendants in their official capacities discriminating against him by reason of his race and color, in violation of the Constitution, statutes and laws of the United States.

2. That on the 28th day of July, A. D. 1928, there was held in the State of Texas, and in the County of El Paso in said State, a primary election for the nomination of candidates for offices upon the Democratic ticket; that prior to said date the defendants James Condon and C. H.

Kolle were duly appointed as Judge and Associate Judge of election in and for Precinct No. 9, El Paso County, Texas, and qualified and acted as such at the Democratic primary election duly held in and for such precinct on July 28th, 1928. That the aforesaid primary election was held on said day for the purpose of selecting candidates for all precinct, county, district and State Officers of the State of Texas, and for representatives in the Congress of the United States, and for United States Senator, and that there were six candidates for United States Senator and two candidates for representative in Congress, one of whom was to be nominated or selected as the nominee of the Democratic party at said primary election.

[fol. 3] 3. That plaintiff is a negro as defined by the statutes of the State of Texas and belongs to the colored, or negro race, and upon said date, to-wit, July 28, 1928, was, and for more than a year prior thereto had been, a resident of said Precinct No. 9 in the City and County of El Paso, Texas; that he is a natural born citizen of the United States of America and of the State of Texas; that he was born in the State of Texas of parents who were citizens of the United States; that he is forty-five years of age, and subject to none of the disqualifications or disabilities provided by the Constitution of the State of Texas for an elector; that he has resided in the County of El Paso, State of Texas, for eighteen years last past, and that he duly paid his poll tax for the year 1927 in El Paso County, before the 31st day of January, 1928, and that he was duly registered as a qualified voter in said Precinct No. 9 in said County, and his name was duly certified by the Tax Collector of said County as a qualified voter and elector in and for said Precinct No. 9 five days prior to said Primary Election and was on said day and date a duly qualified voter and elector of Precinct No. 9, El Paso County, Texas.

4. That plaintiff is and on the 28th day of July, 1928, was a bona fide member of the Democratic party of the State of Texas, and in every other respect is and was entitled to participate in all elections held within the State of Texas, whether for the nomination of candidates for office or otherwise, and that he offered to take the pledge to support the nominees of the Democratic primary election held on said day as aforesaid and to comply in every respect with

the valid requirements of the laws of the State of Texas relating thereto, save as they violated the rights and privileges conferred upon and guaranteed to him by the Constitution and laws of the United States as aforesaid.

[fol. 4] 5. That on said 28th day of July, 1928, plaintiff presented himself at the polling place in said Precinct No. 9 and tendered his poll tax receipt for the year 1928 within the hours prescribed by law for the holding of said election, and requested of the defendants Condon and Kolle that he be supplied with a ballot and permitted to vote in said election, and that said defendants thereupon wrongfully and unlawfully refused to permit plaintiff to vote or to furnish him with a ballot; and stated as reason therefor that under the instructions given them by one H. O. Cregor, the Chairman of the County Democratic Executive Committee of El Paso County, Texas, pursuant to the resolution of the State Democratic Executive Committee of Texas, hereinafter set forth, adopted under the authority of Chapter 67 of the Laws of 1927 enacted by the Legislature of the State of Texas, hereinafter set forth, only white Democrats were allowed to participate in the Democratic primary election then in process.

6. That plaintiff is informed and believes and so alleges that the defendants Condon and Kolle refused the plaintiff his right to vote at said election by reason of the following resolution passed by the State Democratic Executive Committee of Texas, prior to July 28, 1928, to-wit:

"Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

[fol. 5] 7. That the aforesaid resolution was adopted by the State Democratic Executive Committee of Texas under authority of the Act of the Legislature of the State of Texas, approved June 7, 1927, at First Called Session of the Fortieth Legislature, which is designated as Article

3107, and being Chapter 67 of Laws of 1927, and being in words and figures as follows:

"Authorizing Political Parties Through State Executive Committees to Prescribe Qualifications of Their Members

(H. B. No. 57)

Chapter 67

An Act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substituting in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in [fol. 6] its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or nonmembership in organizations other than the political party.'

Sec. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved June 7, 1927.

Effective 90 days after adjournment."

8. That prior to the enactment by the Legislature of the State of Texas of Chapter 67 of the Laws of 1927, the Legislature of Texas, in the year 1923, passed Article 3093a of the Revised Civil Statutes of the State, which read as follows:

"Article 3093a. All qualified voters under the laws and constitution of the State of Texas who are bona fide [fide] members of the democratic party shall be eligible to participate in any democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a democratic party primary election held in the State of Texas, and should a negro vote in a democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

[fol. 7] That at the general primary election held in the County of El Paso, Texas, on July 26, 1924, plaintiff, who was then a bona fide Democrat with all the qualifications of a voter, applied to Judge and Associate Judge of elections in Precinct No. 9 of El Paso County, Texas, to supply him with a ballot and to permit him to vote, which they declined to do, solely on the ground that he was a negro, on the authority of the aforesaid Article 3093a; that thereupon the plaintiff brought an action against the aforesaid Judge and Associate Judge of elections to recover the damages sustained by him by reason of their wrongful refusal to permit him to vote, and thereafter such proceedings were had in said action that on March 7, 1927, the cause reported under the name and title of Nixon v. Herndon in 273 United States Reports at page 536, the said Article 3093a was declared unconstitutionall and void by the Supreme Court of the United States, in that it denied to the plaintiff the equal protection of the laws; that the decision of the Supreme Court of the United States is the same decision which is referred to in Section 2 of Chapter 67 of the Laws of 1927 of the State of Texas, and that said statute, which was approved on June 7, 1927, and pursuant to which the resolution of the State Democratic Executive Committee hereinbefore set forth was adopted, constituted an evasion of the determination of the Supreme Court of

the United States and of the provisions of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and was enacted and adopted for the purpose of denying to the plaintiff and all other negroes of the State of Texas who belong to the Democratic party the right to vote in Democratic party primaries held in said State.

[fol. 8] 9. That at the time of the passage of Chapter 67 of the Laws of 1927 aforesaid the Democratic [Democratic] party was the only one of the great political parties in the State of Texas which held primary election in that State, and, although couched in general terms, the aforesaid statute, when it referred to a State Executive Committee of Texas, and no other, the right to determine who should be qualified to vote or otherwise participate in Democratic primary elections held in said State, and was enacted by its Legislature for the purpose of preventing plaintiff and other negroes of the State who were members of the Democratic party from participating in Democratic primary elections.

10. That said Act of the Legislature and said resolution of the State Democratic Executive Committee, based thereon, are inoperative, null and void, in so far as they allowed only white Democrats who were qualified voters to participate in the Democratic party primary elections held in the State of Texas on July 28, 1928, and in effect prohibited this plaintiff, because he is a negro, from voting in said primary election; that the aforesaid resolution and the aforesaid Act of the Legislature pursuant to which said resolution was adopted and enforced, are violative of and contrary to the Constitution of the United States:

(a) Of the Fourteenth Amendment to said Constitution, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," in that they denied to the plaintiff the equal protection of the Laws of Texas.

[fol. 9] (b) Of the Fifteenth Amendment to the said Constitution, which provides: "That the rights of citizens of

the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous conditions of servitude," in that the plaintiff's right to vote at the aforesaid primary election was denied and abridged by the aforesaid resolution and by the aforesaid Act of the Legislature of Texas, on account of his race and color.

(c) And are also contrary to the statutes enacted by the Congress of the United States, and especially to Section 31 of Title 8 of the United States Code (formerly Section 2004, of the United States Revised Statutes), which provides: "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at such election, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority to the contrary notwithstanding."

11. That there are many thousand negro Democratic voters in the State of Texas situated as is the plaintiff in this case; that the State of Texas is a State which is normally so overwhelmingly Democratic that a nomination on the Democratic ticket is equivalent to an election to the office for which such Democratic candidate is nominated, and that there is practically no contest for the selection of public officers within the State save that which takes place in Democratic primaries between candidates for nomination by the Democratic party.

[fol. 10] 12. That the aforesaid acts on the part of the defendants and each of them in denying plaintiff the right to vote at the Democratic primary election held on July 28, 1928, were wrongful, unlawful, and without constitutional warrant, and deprived him of a valuable political right to his damage in the sum of Five Thousand Dollars ($5,000.00).

Wherefore plaintiff prays that summons be issued directed to each and all of the defendants at their respective residences compelling them to answer this petition, and

upon hearing that plaintiff have judgment against the defendants and each of them jointly and severally for the sum of Five Thousand Dollars, together with costs of this suit, and for such other further relief as may be appropriate and just in the premises.

(Signed) Knollenberg & Cameron and Louis Marshall, Attorneys for Plaintiff.

[fol. 11] Citation issued to James Condon and C. H. Kolle and Marshal's return thereon omitted from the printed record.

* * * * * * *

IN UNITED STATES DISTRICT COURT

DEFENDANTS' FIRST AMENDED MOTION TO DISMISS—Filed May 18, 1929

Come now the defendants in the above styled and numbered cause and leave of the Court having been obtained to file this amended motion, move the Court to dismiss plaintiff's first original petition heretofore filed in this cause, and for grounds of dismissal set forth the following grounds, to-wit:

I

That the subject matter of this suit is political in its nature, and that this Court is without jurisdiction to determine the issues involved, or to award the relief prayed for.

II

That the plaintiff is not a proper party to maintain this suit.

III

That the matters and allegations in said petition are not sufficient to constitute a cause of action against these defendants or either of them.

[fol. 12] IV

That the Fourteenth and Fifteenth Amendments to the Constitution of the United States and Statutes enacted by

the Congress of the United States pursuant thereto do not appear to have been violated from the allegations in said petition.

V

That the primary election held on the 28th day of July, A. D. 1928, in the State of Texas and County of El Paso was not an election within the meaning of the Constitution of the United States, or any laws pursuant thereto, or the Fourteenth and Fifteenth Amendments to the Constitution of the United States, but that said petition shows that such primary election constituted merely a nomination for an election, and that no deprivation of any right to vote at an election is alleged in said petition.

VI

That said petition states no cause of action against defendants for damages for refusing a vote for the reason that the Acts of the Fortieth Legislature of the State of Texas, First Called Session, 1927, page 193, Chapter 67, paragraph 1, provides that the State Executive Committee of each political party shall have the right to prescribe the qualifications of its members, and that said State Executive Committee in prescribing such qualifications has excluded the plaintiff in this case.

VII

That the provisions of the above mentioned Act of Texas Legislature, all as fully set forth in plaintiff's petition, are in all respects valid and are not in conflict with the Consti- [fol. 13] tution of the United States or any amendments thereto, or in conflict with any of the Statutes of the United States enacted in pursuance of such Constitution or Amendments.

VIII

That the Constitution of the State of Texas and the laws of the State of Texas do not, from the allegations in this petition, appear to have been violated.

IX

That irrespective of any statutory authority the State Executive Committee of a political party has authority to

determine who shall comprise its membership, and *and* in this instance the State Executive Committee of the Democratic party of the State of Texas has excluded the plaintiff from membership in such political party, and that this exclusion did not violate any portion of the Constitution of United States, or of the Statutes amended by the Congress of the United States.

X

Defendants further deny that portion of plaintiff's petition which sets out that plaintiff was a Democrat, and hereby allege that plaintiff was not a Democrat at the time plaintiff's alleged cause of action arose.

(Signed) Ben R. Howell, Attorney for Defendants.

[fol. 14] In United States District Court

Order Dismissing Petition—Filed July 31, 1929

On this, the 31st day of July, A. D. 1929, after due hearing before the Court, it is ordered, adjudged and decreed by the Court that defendants' motion to dismiss, heretofore filed in this cause, be and the same is hereby sustained, and that this case be and the same is hereby dismissed at plaintiff's costs, to which order plaintiff, in open Court, excepted and gave notice of appeal.

(Signed) Charles A. Boynton, United States District Judge.

O. K. to form. Knollenberg & Cameron.
O. K. Ben R. Howell.

In United States District Court

Notice of Appeal—Filed Aug. 31, 1929

Notice of Appeal to the Above-named Defendants or Ben Howell, Their Attorneys of Record

You are hereby notified that the above named plaintiff, L. A. Nixon, feeling aggrieved by the judgment rendered in

the above styled and numbered cause by the District Court of United States in and for the Western District of Texas [fol. 15] on the 31st day of July, A. D. 1929, does hereby appeal from said judgment and all of said judgment, and this notice is hereby given you under and by virtue of the Act of Congress providing for appeals in such cases.

(Signed) Louis Marshall, Knollenberg & Cameron, Attorneys for Plaintiff.

Received copy of the above notice this 30th day of August, 1929. Service of same is hereby accepted and further notice and service of same is hereby waived.

(Signed) Ben R. Howell, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Aug. 30, 1929

To the Honorable Charles A. Boynton, District Judge:

The above named plaintiff, L. A. Nixon, feeling aggrieved by the judgment rendered and entered in the above entitled cause on July 31, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herein and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said decree is based duly authenticated be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules in such cases made and provided; that the appeal is taken from all of said judgment.

[fol. 16] And he further prays that the proper order relating to the required security to be required of him be made.

(Signed) Louis Marshall, (Signed) Knollenberg & Cameron, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL AND FIXING BOND—Filed August 30, 1929

On this 14th day of October, A. D. 1929, upon consideration of the above application, it is hereby ordered that the

appeal as prayed for be and the same is hereby allowed, and that a certified transcript of the record and all proceedings in said cause be forthwith transmitted to the United States Circuit Court in and for the Fifth Circuit. It is ordered that the Appeal Bond be fixed at the sum of $300.00.

(Signed) Charles A. Boynton, United States District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Aug. 30, 1929

The United States District Court for the Western District of Texas erred in sustaining defendants' motion to dismiss and in dismissing said cause by its order and judgment of July 31, 1929, for the following reasons:

1. This case involves the construction and application of the Constitution of the United States and especially of the Fourteenth and Fifteenth Amendments thereto.

[fol. 17] 2. This is a case in which a law of the State of Texas and the administration and application of said law is claimed to be in contravention of the Constitution of the United States.

3. This is a suit for damages to redress the deprivation under color of law of a right and privilege secured by the laws of the United States, providing for equal rights of its citizens and of all persons within its jurisdiction.

4. This is a suit for damages for being deprived of the right to vote, solely on account of race and color and is based upon rights guaranteed by the constitution of the United States.

5. The plaintiff was denied the right to vote in the Democratic primary election on July 28, 1929, at El Paso, Texas, where there was a candidate for the office of Representative in the lower house of the United States Congress and for the office of United States Senator as well as the various State officers and this plaintiff was denied a right to vote solely upon the fact that he was a negro—he possessing all qualifications—and said plaintiff was denied this right because the legislature of the State of Texas

has passed a law with an emergency clause, fully set out in plaintiff's petition authorizing the State Democratic Executive Committee to prescribe qualifications for its members, and said Democratic Executive Committee had prescribed that a negro was not qualified to vote at a Democratic primary election, and such acts are in violation of the Constitution of the United States, which prohibits a citizen from being discriminated against in his right to vote because of his race and color.

[fol. 18] 6. The Court erred in holding that the act of the Texas Legislature approved June 7, 1927, at the first called session of the Fortieth Legislature, which is designated as Article 3107, being chapter 67 of the Laws of 1927 was not unconstitutional, and not in violation of the Fourteenth and Fifteenth Amendment of the Constitution of the United States, which is plead and set out in full in plaintiff's petition.

7. The Court erred in holding that the resolution passed by the Democratic Executive Committee of Texas prior to July 28, 1928, set forth in plaintiff's petition and is as follows:

"Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and Secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

was not a violation of the right to the plaintiff, a citizen of the United States, which denied him the right to vote in the Democratic primary of July 28, 1928, in El Paso County, Texas, but said resolution was a direct violation of the constitutional rights of plaintiff.

8. The Court erred in holding that the Democratic primary of July 28, 1928, was not an election within purview and meaning of the Fifteenth Amendment of the Constitution of the United States, and section 31, title 8, U. S. C. A.

[fol. 19] (R. S. U. S. 2004) for the reason that in the case of Nixon vs. Herndon, 273 U. S. 536, the Supreme Court of United States has held that such a primary is an election and that the denial of a citizen to vote in that election, constitutionally qualified was a denial of a legal right.

9. The Court erred in holding that the State of Texas, who has no right to discriminate against the citizen from voting in a Democratic primary in Texas as was held in Nixon vs. Herndon 273 U. S. 536 has the right to delegate that authority to the State Democratic Executive Committee of Texas, thus doing indirectly what they can not do directly.

10. The Court erred in holding that the members of the State Democratic Executive Committee and the judges and clerks of the primary election were not officials of the State of Texas and not acting as officials of the State of Texas when performing their duties as prescribed by the Statutes of Texas—and in making a distinction between the instant case and the case of James O. West vs. A. C. Bliley, et al. decided by the Honorable United States District Court of the Eastern District of Virginia—in the Virginia case, the election judges and clerks were paid by the state, and in this case they were paid by the various candidates—such a distinction would make all fee officers private citizens and not officials.

11. The Court erred in holding that a State Democratic Executive Committee has a right to discriminate against a citizen's right to vote at a primary election because of his color—such a discrimination is in violation of the Fourteenth and Fifteenth Amendment to the Constitution of the United States.

[fols. 20 & 21] 12. The Court erred in holding that the Democratic State Executive Committee and the judges and clerks of the primary election of July 28, 1929, were not acting by authority of the State, and thus as agents of the State—and thus discriminating against a citizen of the United States on account of his color.

13. The Court committed fundamental error in sustaining defendants' motion to dismiss plaintiff's case—for the reason that the petition stated a good cause of action at law.

Wherefore plaintiff-appellant prays that said errors be corrected and said cause be remanded for a new trial.

(Signed) Louis Marshall, Knollenberg & Cameron, Attorneys for Plaintiff.

Bond on appeal for $300.00, approved and filed October 22, 1929, omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Oct. 22, 1929

To D. H. Hart, clerk of said court:

Please take notice that the appellant (plaintiff) designates the following as portions of the record in this cause, which he hereby requests be incorporated in the transcript on this appeal:

[fol. 23] 1st. Citation in District Court.
2nd. Marshal's Return on Said Citation.
3rd. Plaintiff's Original Petition.
4th. Defendant's First Amended Motion to Dismiss.
5th. Judgment sustaining Plaintiff's Motion to Dismiss.
6th. Plaintiff's Assignment of Errors.
7th. Order Allowing Appeal and Fixing Bond.
8th. Notice of Appeal and Waiver thereon.
9th. Citation in Error and Waiver thereon.
10th. Appeal Bond.
11th. This Præcipe.

Yours respectfully, E. F. Cameron, Fred C. Knollenberg, Attorneys for Appellant.

IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed July 31, 1929

Plaintiff brings suit herein, in its nature an action at law for recovery of damages, against defendants for their refusing, as Judges at a Democratic primary election, to

[fol. 24] permit plaintiff, a negro, to vote at such Democratic primary election in the State of Texas; alleging that plaintiff was by such action of defendants as Judges of such primary election deprived of rights to which plaintiff alleges he is entitled as a citizen of the United States under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and under and by virtue of statutes and laws of the United States, viz: Sec. 31, Title 8, U. S. C. A. (R. S. Sec. 2004), and Sec. 43, Title 8, U. S. C. A. (R. S. 1979), as warranting maintaining of this action, and jurisdiction of same as vested in the United States District Court under Secs. 11 (R. S., Sec. 629, par. 12, Mar. 3, 1911), 12 (R. S. Sec. 563, par. 11, Mar. 3, 1911, Sec. 629, par. 17, Mar. 3, 1911), and 14 (R. S. Sec. 563, par. 12; Sec. 629, par. 16, Mar. 3, 1911), Sec. 41, Title 28, U. S. C. A.

The petition alleges that plaintiff is a negro, a citizen of the United States and of the State of Texas, and a resident of El Paso, El Paso County, Texas, and in every way qualified to vote, as set forth in detail in his petition herein; that on July 28, 1928, a Democratic primary election was held at El Paso, and throughout the State of Texas, on said date for the nomination of candidates for a Senator and Representatives in Congress, and State and other officers upon the Democratic ticket; that the plaintiff being a member of the Democratic party sought to vote and presented himself at time and place specified and asked for a ballot and requested the privilege to vote at such primary election, but was refused a ballot and denied by defendants the right to vote at such primary election, defendants acting as election judges at holding of such Democratic primary election, held in the election precinct of which plaintiff was a resident in the City of El Paso, El Paso County, Texas; that such denial by defendants to permit plaintiff to vote [fol. 25] at such Democratic primary election was based on and in accordance with instructions of the Chairman of the Democratic County Executive Committee of El Paso County, Texas, in turn based on and in accordance with resolution passed by the State Democratic Executive Committee of Texas, prior to July 28, 1928, to-wit:

"Resolved: That all white Democrats who are qualified, and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed

to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

plaintiff alleging the aforesaid resolution was adopted by the State Democratic Executive Committee of Texas under authority of an Act of the Legislature of the State of Texas, approved June 7, 1927, at First Called Session of the Fortieth Legislature, which is designated as Article 3107, and being Chapter 67 of Laws of 1927, and being as follows:

"Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

[fol. 26] and plaintiff further alleging that such Act of the Legislature of the State of Texas, aforesaid, and resolution of the State Executive Committee of Texas, aforesaid, instructions of the Chairman of the Democratic County Executive Committee of El Paso County, Texas, and action of defendants as election judges at such Democratic primary election, are contrary to and in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and statutes and laws of the United States hereinbefore recited; and plaintiff brings this action herein for the recovery of damages to redress an injury which he alleges he sustained by reason of the acts of defendants in their official capacities, as election judges at such Democratic primary election, discriminating against him by reason of his race and color, in violation of the Constitution, statutes and laws of the United States.

Defendants have filed, and present to the Court, motion to dismiss, urging as grounds for dismissal, together with

other grounds deemed immaterial, and unnecessary to be considered and passed upon by the Court, the following: That the matters and allegations in plaintiff's petition are not sufficient to constitute a cause of action against defendants or either of them; that the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and Statutes enacted by the Congress of the United States pursuant thereto, do not appear to have been violated from the allegations in said petition; that the primary election held on the 28th day of July, A. D. 1928, in the State of Texas, and County of El Paso was not an election within the meaning of the Constitution of the United States, or any laws pursuant thereto, or the Fourteenth and Fifteenth Amendments to the Constitution of the United States, but that plaintiff's petition shows that such primary election con- [fol. 27] stituted merely a nomination for an election, and that no deprivation of any right to vote at an election is alleged in said petition; that the provisions of the Act of the Texas Legislature, as fully set forth in plaintiff's petition, are in all respects valid and not in conflict with the Constitution of the United States or any amendment thereto, or in conflict with any of the Statutes of the United States enacted in pursuance of such Constitution or amendments; that the Constitution of the State of Texas and laws of the State of Texas do not, from the allegations in plaintiff's petition contained, appear to have been violated; that irrespective of any statutory authority the State Executive Committee of a political party has authority to determine who shall comprise its membership, and in this instance the State Executive Committee of the Democratic party of the State of Texas has excluded the plaintiff from membership in such political party, and that this exclusion did not violate any portion of the Constitution of the United States, or of the statutes enacted by the Congress of the United States.

By the Thirteenth Amendment to the Constitution slavery and involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, was abolished, prohibited to exist within the United States, or any place subject to their jurisdiction; and Congress vested with power to enforce the provisions of such Amendment by appropriate legislation.

The Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 28] The Fourteenth Amendment by effect of wording thereof thus including and declaring as citizens of the United States all members of the negro race, including those who prior to such Amendment have been held in slavery in various States of the Union.

The Fifteenth Amendment, which in express terms alone relates to the subject of suffrage, the right to vote, provides as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." and further that Congress shall have power to enforce said Amendment by appropriate legislation.

Thus by the Thirteenth Amendment slavery was abolished; by effect of the Fourteenth Amendment negroes, were made, included and declared citizens of the United States and of the States wherein they reside; and by the Fifteenth Amendment it was provided that the right of citizens of the United States, all citizens, to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude; and Congress given power to enforce the provisions of said Amendments by appropriate legislation. These three Amendments being known and designated as the "Civil War Amendments," were passed and ratified in the years 1865, 1868, and 1870, respectively, and though applying to all citizens alike passage and adoption of same was prompted and deemed necessary for protection of the civil and political rights of those of the African race and their descendants, negroes, who had just been freed from slavery. Those sections of the Statutes of the United States, viz: Sec. 31, Title 8, U. S. C. A., and Sec.

43, Title 8, U. S. C. A., relied upon by plaintiff as authorizing maintaining of his action herein, were passed by Congress on May 31, 1870, and April 20, 1871, respectively.

The Fourteenth and Fifteenth Amendments are each expressly and exclusively directed against action by any [fol. 29] State, prohibits and restrains any State from enacting any law, or action by any State, or action under color of law of such State, depriving any citizen of the United States of any civil right guaranteed by the Fourteenth Amendment, and a political right, the right to vote, exercise of the elective franchise, guaranteed by the Fifteenth Amendment, respectively; as held by an unbroken like of decisions of the Supreme Court of the United States. It is also held by said decisions that there is no violation of either the Fourteenth or Fifteenth Amendments to the Constitution of the United States, unless the wrong complained of be based on some action by a State of the United States, by enactment as a governmental body, as a legislative body, of a law, or action by some official or governmental agency acting for the State in the name of the State, or under color of law, in distinction from that of private individuals. That if the wrong complained of be not that of the State or of some official or governmental agency acting for and in name of the State, but be the action of some private individual or individuals, no action lies that can be maintained under said Amendments, respectively, and statutes of the United States above cited. Slaughterhouse Cases, 16 Wall. 36; 83 U. S. 36; United States vs. Reese, et al., 92 U. S. 214, 218; United States vs. Cruikshank, et al., 92 U. S. 542; Strauder vs. West Virginia, 100 U. S. 303; Virginia vs. Rives, 100 U. S. 318; Ex Parte Virginia, 100 U. S. 339; Ex Parte Seibold, 100 U. S. 371; Neil vs. Delaware, 103 U. S. 370; United States vs. Harris, 106 U. S. 629, 641; Civil Rights Cases, 109 U. S. 3; Ex Parte Yarbrough, 110 U. S. 651, 664; Yick Wo vs. Hopkins, 118 U. S. 356, 365, 370, 373; In re Kemmler, 136 U. S. 436, 438, 448; McPherson vs. Blacker, 146 U. S. 1, 23-25; Gibson vs. Mississippi, 162 U. S. 565, 579; Carter vs. Texas, 177 U. S. 442; Wiley vs. Sinkler, 179 [fol. 30] U. S. 58; 65; Swafford vs. Templeton, 185 U. S. 487, 491; Giles vs. Harris, 189 U. S. 475, 485; James vs.

Bowman, 190 U. S. 127, 136; Hodges vs. United States, 203 U. S. 1, 15, 19; Guinn vs. United States, 238 U. S. 347, 354; Meyers vs. Anderson, 238 U. S. 369; United States vs. Mosley, 238 U. S. 383; Buchanan vs. Warley, 245 U. S. 60; Love, et al., vs. Griffith, et al., 266 U. S. 33; Corrigan vs. Buckley, 271 U. S. 323, 330; Nixon vs. Herndon, 273 U. S. 536, 540; Grigsby vs. Harris (D. C., S. D. Tex.), 27 F. (2d) 942.

Plaintiff's petition alleges that in 1923 the Legislature of Texas passed an Act, Art. 3093a, which read as follows:

"Article 3093a. All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the democratice party shall be eligible to participate in any democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a democratic party primary election held in the State of Texas, and should a negro vote in a democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

And that the Supreme Court of the United States in case of Nixon vs. Herndon, opinion by Justice Holmes (March 7, 1927), 273 U. S. 536, 539-541, held said act unconstitutional, as an act, a law, enacted by the legislature of Texas, that in its language, and express provisions, was in direct violation, as held by the Court, of the Fourteenth Amendment to the Constitution of the United States; in that such act was clearly an enactment by the State Legislature of the State of Texas of a law depriving a citizen of the [fol. 31] United States, because of race or color, of a civil right or rights guaranteed him by the Fourteenth Amendment, as a citizen of the United States, and therefore plaintiff in said case was entitled to maintain his action therein, one for recovery of damages, because same was based upon action taken by defendants, in denying plaintiff the right to vote at a Democratic primary election, under and by virtue of unconstitutional and void act or law enacted by a State, the State of Texas, viz: the enactment of said Art. 3093a, aforesaid, so held to be unconstitutional by the Supreme Court of the United States in said case of Nixon

vs. Herndon, supra; the Supreme Court citing as in support of its opinion in said case Wiley vs. Sinkler, supra, and Giles vs. Harris, supra. Plaintiff further alleges in his petition, herein, that following such decision of the Supreme Court of the United States in Nixon vs. Herndon, supra, the Legislature of Texas by the Act approved June 7, 1927, specially repealed said Art. 3093a and enacted Art. 3107, being Chapter 67 of the laws of Texas of 1927, in this opinion hereinbefore recited, and contends that said Act, Art. 3107, is unconstitutional in that it is sought and intended thereby to delegate to the State Executive Committees of political parties in Texas power to exclude colored persons, negroes, from voting at primary elections.

Without undertaking to quote from decisions of the Supreme Court of the United States above cited, holding that action cannot be maintained unless it be based upon some action of a State held to be in violation of the Fourteenth or Fifteenth Amendments, it here appears to the Court, and the Court so finds and holds, that said Act of the Legislature of the State of Texas approved June 7, 1927, Art. 3107 of the Revised Statutes of the State of Texas, here in question, is not unconstitutional, the enactment by the State of Texas of a law in violation of either the Four- [fol. 32] teenth or Fifteenth Amendments to the Constitution of the United States. The wrong here complained of, alleged as basis of Plaintiff's action, consists of and arises from the resolution passed by the State Democratic Executive Committee, prior to July 28, 1928, in this opinion above quoted, and instructions to Democratic County Chairman in Texas as in said resolution recited, and action of defendants as judges at a primary election, in denying and refusing to permit plaintiff to vote at such Democratic primary election held July 28, 1928, as in plaintiff's petition alleged. The language of the act of the Legislature here complained of, Art. 3107, shows that in itself there is no vice, as in Art. 3093a held to be unconstitutional in the case of Nixon vs Herndon, supra; as said Art. 3107 provides no action by a State, and directed no action be taken upon the part of any person or individuals that is prohibited by either the Fourteenth or Fifteenth Amendments, under decisions of the Supreme Court of the United States above cited. Said action by the State Democratic Executive Committee, by passage of the resolution above cited, here in

question, and by defendants in denying and refusing to permit plaintiff to vote at such Democratic primary election, is not shown to be the act of the State of Texas, but to be that taken by private individuals; and it is therefore held plaintiff is not warranted to maintain action as in his petition alleged, and this Court is without jurisdiction over same, the wrong complained of in plaintiff's petition, unless it can be held that defendants in refusing to permit plaintiff to vote at such primary election, were acting as officials or governmental agencies of the State of Texas, in name of the State.

In each of the cases, Nixon vs. Herndon, 273 U. S. 536; the Child Labor Tax case, 259 U. S. 20; Standard Scales Company vs. Farrell, 249 U. S. 577; Hammer vs. Hodenhart, 247 U. S. 251; Home Telephone & Telegraph Company [fol. 33] vs. Los Angeles, 227 U. S. 278; Yick Wo vs. Hopkins, 118 U. S. 356; and Williams vs. Bruffey, 96 U. S. 176, and other cases cited and relied upon by plaintiff herein, examination of the facts disclose that the action complained of was based upon some law enacted by the legislative department of a State, by municipal corporation, some commission or body corporate, or some person or individual, as an official of the State acting in their official capacity, each being State officers, legally holding official position under the State, or some body corporate of the State as a governmental body, acting as such in the name of the State, and not as private individuals.

The Court here holds that the State Democratic Executive Committee of the State of Texas, at time of the passage of the resolution here complained of, was not a body corporate to which the Legislature of the State of Texas could delegate authority to legislate, and that the members of said Committee were not officials of the State of Texas, holding position as officers of the State of Texas, under oath, or drawing compensation from the State, and not acting as a State governmental agency, within the meaning of the law, but only as private individuals holding such position as members of said State Executive Committee by virtue of action taken upon the part of members of their respective political party; and this is also true as to defendants, they acting only as representatives of such political party, viz: the Democratic party, in connection with the holding of a Democratic primary election for the nomina-

tion of candidates on the ticket of the Democratic party to be voted on at the general election, and in refusing to permit plaintiff to vote at such Democratic primary election defendants were not acting for the State of Texas, or as a governmental agency of said State.

[fol. 34] The expenses of holding primary elections in the State of Texas, under the laws of Texas undertaking in certain particulars to regulate primary elections, are not paid by the State of Texas, but by the primary election law of Texas, Art. 3108 R. S. of Texas, it is provided that such expenses of holding primary elections shall be paid by the respective candidates offering themselves for selection as nominees or candidates of their respective political organizations, to be voted on for election by the people, electors, of the State as a whole at a general election. In the States of Illinois, Virginia, and perhaps other States in which laws exist governing the holding of primary elections, the expenses of the holding and conducting of such primary elections in said States are paid out of the funds of the State, which is not the case in Texas, as above noted. It has been held in Illinois, as shown by decisions of the Supreme Court of said State cited by plaintiff's counsel, that the judges and clerks holding and conducting primary election in Illinois, in which an official ballot is used, and members of all political parties are privileged to vote in such primary, for nomination of the candidates to be selected as nominees of their respective parties; the expenses of holding such primary election are paid out of State funds, and the judges and clerks of such primary election of said State draw compensation, and are held to be officials of the State. This appears also to be the case in Virginia, that is to say the holding of a primary election is paid for by State funds, and held to be a governmental agency, and persons conducting such elections, judges, clerks, etc. held to be officials of the State, they drawing compensation from the State for services rendered, and acting in the name of the State, as recited in recent opinion of United States District Judge D. Lawrence Groner, of the Eastern District of Virginia, ren-

[fol. 35] dered in the case of James O. West vs. A. C. Bliley, et al., and apparently made the basis of such opinion, which opinion has not yet been published in the official reports, in which the Court overruled demurrer to plaintiff's declaration holding that action of defendants in said case in ex-

cluding the plaintiff, a negro, from voting at a Democratic primary election was an infringement of rights guaranteed to him by the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and showed cause of action maintainable in the United States Court under Sec. 43, Title 8, U. S. C. A. (R. S. 1979).

The Supreme Court of the United States said in case of Virginia vs. Rives, supra; "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals." Again in Ex Parte Virginia, supra, "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." Such statement of the law by the Supreme Court is quoted with approval in James vs. Bowen, supra, and many other decisions of the Supreme Court previously cited in this opinion.

It is here held by the Court that by no line of justified reasoning, based on the facts in plaintiff's petition alleged, and provisions of the primary election laws of Texas, can it be held as a matter of law that the members of the State Democratic Executive Committee, or of any other political party in Texas, or defendants herein acting as election [fol. 36] judges at the primary election in question, were officers of the State of Texas, were such at time of acting as such primary election judges, and acting as officials or agents of the State of Texas, or as a governmental agency of said State, in so refusing to allow plaintiff to vote at such primary election. The Court also holds that the members of a voluntary association, such as a political organization, members of the Democratic party in Texas, possess inherent power to prescribe qualifications regulating membership of such organization, or political party. That this is, and was, true without reference to the passage by the Legislature of the State of Texas of said Art. 3107, and is not affected by the passage of said act, and such inherent power remains and exists just as if said act had never been passed.

The Court further holds that a primary election under the laws of the State of Texas is not an "election" within the purview and meaning of the Fifteenth Amendment to the Constitution of the United States, and Sec. 31 of Title 8, U. S. C. A. (R. S. U. S. 2004). Newberry vs. United States, 256 U. S. 232, 250; Koy vs. Schneider, 110 Texas 369, 376, 377; Waples vs. Marrast, 108 Tex. 5, 11; Ashford vs. Goodwin, 103 Tex. 491; Hammond vs. Ash, 103 Tex. 503, and Cunningham vs. McDermett, (C. C. A. of Texas, 1925) 277 S. W. 218. In case of Waples vs. Marrast, supra, the Supreme Court of Texas, opinion by Chief Justice Phillips, in discussing the primary election laws, says, in part:

"A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general election for the con- [fol. 37] trol of the agencies of the government as the means of providing a course for the government in accord with their political principles and administration of those agencies by their own adherents. * * * But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. * * * They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. * * * To provide nominees of political parties for the people to vote upon in the general elections is not the business of the State. * * * Political parties are political instrumentalities. They are in no sense governmental instrumentalities.

At the time of the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and enactment by Congress of Sec. 31, Title 8, U. S. C. A. (R. S. Sec. 2004), and Sec. 43, Title 8, U. S. C. A. (R. S. 1979), and other acts of Congress to protect the rights guaranteed to citizens under said Amendments to the Constitution, primaries, primary elections, were then unknown.

The Supreme Court of the United States in case of Newberry vs. United States, supra, in discussing Sec. 4, Art. 1, of the Constitution of the United States, and the Seven-

teenth Amendment, which directs that Senators be chosen by the people, says:

"Undoubtedly elections within the original intendment of Sec. 4 were those wherein Senators should be chosen by Legislatures and Representatives by voters possessing 'the qualifications requisite for electors of the most numerous branch of the State Legislature.' Art. 1, Secs. 2 and 3. [fol. 38] The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. Hawke vs. Smith, 253 U. S. 221. Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries —the two things are radically different. And this view has been declared by many state Courts. People v. Cavanaugh, 112 California, 674; State v. Erickson, 119 Minnesota, 152; State v. Taylor, 220 Missouri, 618; State v. Woodruff, 68 N. J. L. 89; Commonwealth v. Wells, 110 Pa. St. 463; Ledgerwood v. Pitts, 122 Tennessee, 570."

Hence, holding plaintiff's petition fails to show he has been deprived of any right guaranteed him under the Constitution, Statutes and laws of the United States, or facts showing cause of action of which the United States Court has jurisdiction, defendants' motion to dismiss is hereby sustained, and the case dismissed at plaintiff's costs.

(Signed) Charles A. Boynton, United States District Judge.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

* * * * * * *

[fol. 40] Minute entry of argument and submission, November 10, 1930, omitted in printing.

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 5758

L. A. NIXON, Appellant,

versus

JAMES CONDON and C. H. KOLLE, Appellees

Appeal from the District Court of the United States for the Western District of Texas

Arthur B. Spingarn, Fred C. Kollenberg, E. F. Cameron for Appellant.

Ben R. Howell (Thornton Hardie on the brief) for Appellees.

Before Bryan and Foster, Circuit Judges, and Dawkins, District Judge

OPINION FILED—May 16, 1931

BRYAN, Circuit Judge:

Appellant sued the judges of election for the precinct in which he was registered to recover damages for their refusal to permit him to vote at the primary election held in Texas in 1928 for the nomination of candidates of the Democratic party. He alleged in his petition that he was [fol. 42] a citizen of the United States and of Texas, a member of the Democratic party, and in every way qualified to vote; that he is a negro, and solely because of his race and color he was denied the right to vote by appellees, who as precinct judges of election based their denial of such right upon a resolution, adopted by the State Democratic Executive Committee of Texas which provided "that all white Democrats * * *, and none other, be allowed to participate in the primary elections to be held," etc.; that this resolution was void and of no effect because Chap-

ter 67 of the laws of 1927 enacted by the Legislature of Texas, pursuant to which it was passed, violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The action was dismissed by the district court on motion of Appellees. 34 F. (2) 463. A similar action brought by the same appellant against the precinct judges of election because of their refusal to permit him to vote in the primary election of 1924 held in Texas to nominate candidates of the Democratic party was sustained by the Supreme Court. Nixon v. Herndon, 273 U. S. 536. A statute of Texas enacted in 1923, which later became known as Article 3093a, and which provided that "in no event shall a negro be allowed to participate in a Democratic primary held in the State of Texas," was held in that case to violate the equal protection clause of the Fourteenth Amendment; and it therefore was found unnecessary to consider the Fifteenth Amendment. The Legislature of Texas in 1927 repealed the Act of 1923 which the Supreme Court had shortly theretofore declared unconstitutional in Nixon v. Herndon, supra, and enacted in its place Chapter 67 which provides "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in [fol. 43] its own way determine who shall be qualified to vote or otherwise participate in such political party"; etc.

It is of course to be conceded since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections. The distinction between appellant's cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied permission to vote in the former by State statute, and in the latter by resolution of the State Democratic Executive Committee. It is argued on behalf of appellant that this is a distinction without a difference, and that the State through its legislature attempted by the 1927 act to do indirectly what the Supreme Court had held it was powerless to accomplish directly by the 1923 act. We are of opinion, however, that there is a vast difference between the two statutes. The Fourteenth Amendment is expressly directed against prohibitions and restraints imposed by the States, and the Fifteenth protects the right to vote against denial or abridgment by any

State or by the United States; neither operates against private individuals or voluntary associations. United States v. Cruikshank, 92 U. S. 542; Virginia v. Rives, 100 U. S. 313; James v. Bowman, 190 U. S. 127. A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed. Waples v. Marrast, 108 Tex. 5; White v. Lubbock, 30 (Tex.) S. W. 722; Grigsby v. Harris, 27 F. (2) 942. It did not attempt as did the 1923 act to exclude any voter from membership in any political party. Precinct judges of election are appointed by party executive committees and are paid for [fol. 44] their services out of funds that are raised by assessments upon candidates. Revised Civil Statutes of Texas, §§ 3104, 3108.

Each political party is represented by its own election officials who have nothing to do with conducting the primary of any other party. In these particulars the primary election law of Texas differs radically from that of Virginia, where the State conducts and pays the expenses of holding the primary for all political parties just as it does in the general election. West v. Bliley, 33 F. (2) 177, affirmed by the Circuit Court of Appeals for the Fourth Circuit in 42 F. (2) 101, cannot therefore in our opinion be relied on as authority in this case. It is true that there are many provisions of the Texas primary law which are designed to safe-guard the ballot and secure fair and honest elections; but none of those provisions can justly be said to deny to any citizen of Texas the right to vote in a primary election.

The judgment is affirmed.

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 5758

L. A. NIXON

versus

JAMES CONDON and C. H. KOLLE

JUDGMENT—May 16, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, L. A. Nixon, and the sureties on the appeal bond herein, F. M. Murchison and E. W. Kayser, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Fifth Circuit. Term No. 265. L. A. Nixon, petitioner, vs. James Condon and C. H. Kolle. Petition for a writ of certiorari and exhibit thereto. Filed July 30, 1931. File No. 36,079.